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NO. 82-1437

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HOMEWOOD CITY BOARD OF EDUCATION; DR. GEORGE C. FRENCH, individually; JAMES L. HOLLOWAY, DR. MAMIE L. FOSTER, RICHARD T. OWENS, ROBERT BLACKSHEAR, and ELBERT R. BOONE, individually; MICHAEL S. GROSS, CLYDE J. COOK, JR., N. P. ARDILLO, CLAYTON C. NUNN, and MARGARET KACHELHOFER in their official capacities with the Homewood City Board of Education,

Petitioners,

v.

JEAN AVERY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF OF ALABAMA ASSOCIATION OF SCHOOL BOARDS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

ALABAMA ASSOCIATION OF SCHOOL BOARDS

Amicus Curiae Alabama Association of School Boards (hereinafter "AASB") was established in 1949 as a voluntary membership organization representing the State's public school boards. In 1955, the Alabama Legislature enacted legislation officially recognizing AASB as "the organization and representative agency of the members of the school boards of Alabama." Section 16-1-6, *Code of Alabama* (1975). AASB's membership includes most of the State's 128 local school boards.

AASB offers a variety of programs to assist local school boards — the statutory bodies which are charged with the general administration and supervision of the public schools — to perform their duties in the most efficient manner possible. The purposes of AASB include promotion of the general advancement of public schools, the promotion of public understanding of the role of school boards, and the interpretation of issues affecting public education in the State of Alabama.

The question presented in the instant case is a matter of great importance to each of the member boards of education which make up the AASB. Briefly stated, that question is whether a school board can terminate an employee when that employee flagrantly violates a valid school policy. The effect of the Court of Appeals' decision is to say that a school board may *not* do so.

Alabama boards of education are gravely concerned about the Court of Appeals' decision in this case. They are concerned not only because that Court decided facts without hearing any evidence, and ignored the findings of the trial judge who *did* hear the evidence, but also because the erroneous decision casts great doubt on the authority of a public school board to make and enforce education policy at the local level. If school boards are not free to make and enforce reasonable rules and policies, they cannot hope to provide quality education to the public.

The particular school board policy involved in this case happens to have been violated by a teacher who gave birth out of wedlock. The policy had nothing whatsoever to do with marriage or the absence of marriage. It simply required that *all* pregnant teachers give the board reasonable notice of their condition. AASB is concerned that the teacher's status as an unwed mother will overshadow and obscure the basic question upon which this case was decided at the trial level and should have been affirmed in the Court of Appeals — whether school boards can enforce their own reasonable education policies.

ARGUMENT

A. Introduction

Section 16-11-18 of the *Code of Alabama* (1975) provides, in pertinent part, as follows:

> The city board of education* shall, upon the written recommendation of the city superintendent of education, determine and establish *a written educational policy* for the city and shall prescribe *rules and regulations for the conduct and management of the schools.* * * * Such written policies, rules and regulations so established, adopted or promulgated shall be made available to all teachers employed by the city board. (emphasis added)

Pursuant to this mandate of the Alabama Legislature, Petitioner Homewood City Board of Education promulgated a written maternity leave policy requiring notice to the Board by the pregnant teacher at least four (4) months prior to the expected birth of the child. The reason for this policy was to enable the Board to have sufficient time to secure suitable substitute teachers and facilitate a smooth transition from one teacher to another. In accordance with law, a copy of the maternity leave policy was made available to Plaintiff/ Respondent Avery. However, when Avery became pregnant, she waited until one (1) month before delivery

* Section 16-8-10 of the *Code* contains a similar provision applicable to *county* boards of education.

to advise the Board that she was about to give birth and would have to stop teaching. After being given a full evidentiary hearing and related procedural protections comporting with the requirements of the Fourteenth Amendment and the Alabama Tenure Law, Avery was discharged for flagrant disregard of the notice policy. The Alabama Tenure Commission affirmed the Board of Education's decision.

In subsequent proceedings in the United States District Court, Avery's counsel stipulated that Avery was aware of the maternity leave policy, that the policy was reasonable and valid, and there was no dispute that Avery substantially violated the policy. The trial judge specifically found that Avery had willfully violated the policy and that the Board dismissed her because of that violation.

On appeal, Avery argued that she would not have been discharged if she had not conceived and given birth out of wedlock — that her admitted violation of the policy was not the real reason for her discharge. For the first time, on appeal, Avery claimed this was a "mixed motive" case and that the trial judge should have applied *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977). The Court of Appeals completely ignored the District Court's findings, completely ignored the fact that the case was neither brought nor tried as a "mixed motive" case, completely ignored the unquestioned legitimacy of the School Board's notice policy and the admitted violation of the policy, made its own factual findings *de novo*, and agreed with Avery. In the process, the Court of Appeals sent a message to the public school boards in Alabama: anytime you discharge a teacher for a willful violation of a board policy, no matter how legitimate and important that policy may be, and no matter how clear the violation, your decision is subject to being overturned if the Court of Appeals does not agree with it.

B. The Decision by the Court of Appeals to Render a Final Decision, Rather Than to Remand to the District Court,

Deprives the Board of a Reasonable Opportunity to Be Heard in Connection With the Mt. Healthy "Mixed Motive" Inquiry.

The serious legal errors committed by the Court of Appeals, including that Court's violation of *Pullman-Standard* v. *Swint*, ... U.S. ....., 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982), by improperly making its own factual findings about the Board's motives, are convincingly addressed by the Petitioners, whose argument AASB adopts. There is no question that this case should be remanded to the Court of Appeals for further consideration in light of *Swint*.

The Court of Appeal's refusal to remand this case to the District Court for further consideration in light of *Mt. Healthy City School Dist. Bd. of Educ.* v. *Doyle, supra,* effectively denies the Board of Education the opportunity to be heard in connection with the "mixed motive" order of proof model set out in *Mt. Healthy*. Respondent Avery made no mention to the District Court of theories pertaining to "mixed-motive" cases. She argued the relevance of *Mt. Healthy* for the first time on appeal. Accordingly, the Board of Education has had no meaningful opportunity to present evidence in the *Mt. Healthy* format. A remand of this case to the District Court would properly provide that opportunity.

Public school boards in Alabama are perplexed by what has happened in this case since it left the District Court. First, a teacher admits to a very serious violation of board policy and does not even pretend that she was confused or surprised by the provisions of the policy. Next, the judge in the federal trial court hears evidence and, based on that evidence, which is essentially without dispute, finds that the teacher was properly dismissed for violating the policy. Somehow, after the case got to the Court of Appeals, it became a "mixed motive" case, and that tribunal decreed that the Board's policy was *absolutely meaningless* and could not support the teacher's discharge. In other words, although no one ever disputed the legitimacy and importance of the policy,

and although the teacher *admitted* her violation of the policy and the District Court found on the evidence that the teacher was discharged *because* of the violation, the Court of Appeals found that the teacher was nevertheless wrongfully discharged and is entitled to have the taxpayers give her back pay and benefits.

AASB's member boards strongly believe that, if the *Mt. Healthy* inquiry had been a part of the proceedings at the District Court level, the evidence would have supported the Board of Education. The Board ought to be given the opportunity to prove that Respondent Avery would have been discharged for violating the policy even if she had been married. To deny this opportunity will be to deny the protections of due process to the Board. It is just as important to provide due process to the Board, as a litigant, as it is to provide due process to a tenured teacher being considered for termination.

C. Reasonable School Board Policies Are Essential to Public Education and Should Not Be Subject to Arbitrary Nullification in the Court of Appeals.

The maternity leave policy of the Homewood City Board of Education is merely typical of a variety of policies on various subjects which every school board in Alabama has and is required by law to have. The boards of education are *serious* about these policies — they cannot function unless they are allowed to enforce these policies. Boards do not create policies so there will be an excuse to discharge an unwanted teacher. They make and enforce policies because discipline and organization are essential to the mission of public education. A public board of education should be given a fair chance to defend these policies in court and should not be subject to having them arbitrarily nullified in the Court of Appeals.

In other words, a board's right to enforce a valid policy should not be summarily denied by an appellate tribunal which has neither seen a witness nor heard one minute of testimony. This case should go back to the trial court for re-analysis in light of the *Mt.*

Healthy decision and the required test thereunder, which was first raised by the Respondent on appeal.

D. The Right of a School Board to Make and Enforce Reasonable Policies is at Stake in this Case.

From the standpoint of the AASB and its member boards of education, this case has very little to do with an unwed mother and *everything* to do with the rights of school boards to establish and enforce school policies. This Amicus Curiae earnestly hopes that this Court will not allow the fact that the Board employee in this case happens to be unmarried to overshadow the basic question this case presents: may a school board terminate an employee when that employee willfully violates a valid school policy?

A teacher should not be exempt from a rule requiring pregnant teachers to report their condition to the Superintendent just because she is not married. It was unfair and arbitrary for the Court of Appeals to find that the Homewood City Board of Education would not have enforced its maternity leave policy against Respondent Avery if she had been married. In so finding, the Court of Appeals did exactly what *Mt. Healthy* warned against: it placed Avery in a better position because of her constitutionally-protected status than she would otherwise have enjoyed.

SUMMARY OF ARGUMENT

By state law, public school boards in Alabama must promulgate written policies for the administration of public education. In this case, a reasonable and important school policy adopted by the Homewood City Board of Education was willfully violated by the Respondent, who was a teacher employed by the Board. For this violation, the Respondent was discharged. The United States District Court affirmed the discharge, holding the policy to be reasonable and finding a clear violation of it by the Respondent.

On appeal, the United States Court of Appeals found that the trial court had erred in failing to apply applicable law and make additional findings called for by that law. Rather than remanding the case to the District Court, the Court of Appeals made its own independent findings of fact, in clear violation of *Pullman-Standard* v. *Swint,* and rendered a decision in favor of the Respondent. In failing to remand and give the Board of Education an opportunity to present evidence under the correct legal standard, the Court of Appeals denied the Board a fair opportunity to be heard.

The decision by the Court of Appeals threatens the right of school boards to make and enforce education policy at the local level. This right is critical to the board's ability to provide sound public education, and should not be denied until the Board has had a fair opportunity to defend its position.

Finally, the Respondent in this case should not be allowed to circumvent the Board of Education's legitimate notice policy merely because she happens to be an unwed mother. The Board should be allowed to apply the policy to her like anyone else. Otherwise, she enjoys an exalted position merely because of her protected status as an unwed mother, which *Mt. Healthy* condemns.

CONCLUSION

The Court of Appeals plainly erred in completely ignoring Respondent's violation of a valid and reasonable policy of the Board of Education. For this reason, and the other reasons set forth herein and in the Petition for Writ of Certiorari, this Court should issue the Writ, reverse the judgment of the Court of Appeals, and remand with instructions that this case be given further consideration in light of *Swint*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Alabama Association of School Boards as Amicus Curiae upon all attorneys of record, namely: The Honorable Michael H. Gottesman, The Honorable James M. Harris, The Honorable Jeremiah A. Collins, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, The Honorable David Rubin, 1201 Sixteenth Street, N.W., Washington, D.C. 20036, The Honorable W. Troy Massey, Post Office Drawer 5058, Montgomery, Alabama 36101, The Honorable Donald B. Sweeney, Jr., The Honorable Sandra K. Vinik, Post Office Box 2366, Birmingham, Alabama 35201, The Honorable J. W. Williams, Jr., 1924 Twenty-Ninth Avenue, South, Birmingham, Alabama 35209, via United States Mail, postage prepaid and correctly addressed, this the ..... day of April, 1983.

.....

T. W. THAGARD, JR.